

THE LEGAL INTERVIEW
AN ANALYSIS OF INTERVIEWING SKILLS AND TECHNIQUES
AS THEY ARE TAUGHT TO AND REQUIRED
OF PRACTICING ATTORNEYS

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"The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. Many thoughtful people, within and outside our profession... question whether our profession is fulfilling [that] historical and traditional obligation. Law schools have traditionally steeped the students in the adversary tradition rather than in the skills of resolving conflicts..."

- Chief Justice Warren Burger

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CHAPTER 1 INTRODUCTION

INTRODUCTION

The lack of effective verbal communication is a major barrier to high quality human relationships of all kinds. This fact remains true whether the relationship is highly personal or strictly superficial. Somewhere between these two extremes lies the relationship which a lawyer has with his/her clients.

High quality verbal communication stands to benefit both the lawyer and the client in many ways. The lawyer can first gain personal satisfaction from a job well done, and ultimately gain the respect of his/her peers within the legal community, which can lead to financial success, job promotions, various honors and awards, and personal satisfaction. On the other hand, the rewards of high quality communication for the client are often times more lucrative, if for instance, a large cash settlement is awarded; and certainly more binding if the verdict after prolonged litigation is "guilty!" The stakes are high. Even though the facts of any legal case remain the same, unless the lawyer is able to ascertain the full depth and breadth of the situation through careful client examination, he is severely handicapped in his ability to be of help to the client. What would happen, for instance, if a doctor overlooked a key question while examining a patient? The results could be

fatal. No less serious is the responsibility of our lawyers to "get the entire story" from their clients. For this reason it is essential that lawyers develop proficiency in their interviewing and counseling skills.

In order for a lawyer to develop proficiency in interviewing and counseling, a number of things must occur. Initially, lawyers need to gain an understanding of the objectives of legal interviewing and counseling and of the factors which motivate clients to participate fully in these processes. Additionally, law students need exposure to these basic interviewing and counseling techniques. Finally, since knowledge of a skill does not necessarily ensure correct usage of a skill, law students need the opportunity to practice the basic techniques of interviewing and counseling clients. Ideally, all of this should take place before the graduation cap is ever placed on the head.

PURPOSE

The process of legal counseling and interviewing, like any process involving human interaction, is very complex. Professional and quality legal interviewing skills are not unattainable. Yet somewhere between identifying these skills as indigenous to the practice of law, and the development of legal curriculum which includes legal interviewing skills (at most of our ABA approved law schools), something has gone awry. As

research in this thesis will show, less than half of our law schools offer any form of instruction in these important skills.

This thesis represents an effort to first ascertain the communication skills required in the practice of law today. In many cases, not only the curriculum, but the entire approach to the study of law was developed years and years ago. In society as fluid as ours, attention must constantly be given to the education which our lawyers receive. Is it of high quality? Is it challenging? Is it applicable to the real world? The only way to answer these questions was to ask the lawyers themselves. This was the purpose behind Questionnaire A.

Once it was determined what communication skills are being required of lawyers, it was then obligatory to find out if the skills being required today are, in fact, being taught to our future lawyers. It was for this reason that Questionnaire B was developed. Finally, in response to the discrepancies found between the interviewing and counseling skills required of the lawyer, and those skills actually taught, a comprehensive review of relevant materials available on the subject has been gathered and systematically defined and applied to today's legal needs.

DEFINITION OF LEGAL INTERVIEWING AND COUNSELING

Throughout this study, the term "legal interviewing" will refer to the interaction between the lawyer and client for the purpose of identifying the client's problem, and for the purpose of gathering information on which a solution to that problem can be based. Given the nature of problems which arise in the dispute resolution context, interviewing will usually involve gathering data about the following: (1) the nature of the client's problem, (2) the client's legal position, and (3) during the course of solution formulation, the probable consequences of adopting litigation or some other cause of action to resolve the problem. The term "counseling" will refer to the process in which lawyers help clients reach decisions to pursue either litigation or some alternative form of settlement. Since these activities are not always clearly delineated, the term "examination" will be used to provide a rough combination of legal interviewing and legal counseling.

These terms will be used as defined throughout the following four chapters: a review of interviewing literature, a description of this thesis' survey methods, the survey's findings, and conclusions drawn from a combination of all of these chapters.

CHAPTER 2 REVIEW OF LITERATURE

This thesis concerns the ways in which lawyers interact with clients in order to help clients solve problems. The specific focus of this thesis is upon three things; first, the material available to help lawyers become effective interviewers; second, the education which students receive in law school in the area of client examination; and, finally, how well equipped lawyers today feel that they are to deal with the many intricacies of the lawyer-client relationship. The following is an analysis of material which has been published in the field of legal interviewing. For simplicity of presentation, this material is divided into three sections: the initial interview, interviewing techniques, and a study done on legal interviewing instruction which will effectively limit the material presented here to the original research presented in Chapters 3 and 4.

THE INITIAL INTERVIEW

When a client enters the attorney's office for the first time, he brings with him certain expectations. The degree to which the attorney is able to meet these expectations will determine the level of satisfaction the client has upon leaving the office. The initial interview, that period of time between the minute the

client walks in and the time he leaves is, therefore, crucial for the attorney, as it is the entire basis for the ensuing attorney/client relationship. Several theories have been proposed on how lawyers can become better conductors of the initial interview.

Three Staged Approach

The first theory which we will examine was proposed by Binder and Price in their book, Legal Interviewing and Counseling. They identify two immediate goals as being an attempt to gain a preliminary understanding of the client's problem, and determine what relief the client seeks. Once the problem has been identified, the lawyer then proceeds to gather information about the client's legal position. In order to accomplish these things, they have identified a "three-staged approach to the initial interview."¹ These three stages are (1) Preliminary Problem Identification, (2) A Chronological Overview, and (3) Theory Development and Verification.

In the first stage, the lawyer asks the client to tell him/her what caused the problem and explain the relief desired. The client is encouraged to describe the foregoing matters in any way that seems comfortable. The lawyer refrains from imposing any particular order on the client's presentation. He asks only for general information and refrains from asking for details.

During the chronological overview stage, the client is encouraged to provide a chronological narrative of

the transaction which caused the problem. The client is also asked to proceed from the point where the client believes the problem began, and follow through, step by step, to the present.

The third stage, that of theory development and verification, involves the lawyer mentally reviewing the entire story, and then determining, based on his knowledge of substantive law, what potential defenses and courses of action are possible. This phase is devoted to exploring, in a conscious, systematic manner, whether or not the specific legal theories suggested in the overview are viable.

Why use the three-staged interview? Binder and Price say that it is very common for lawyers to analyze cases on the basis of inadequate information. By careful initial examination of the client's problem, the lawyer is less likely to make a premature decision about the problem and what should be done to solve it.² Additional advantages to this form include obtaining a more "complete" story, finding out early on what exactly it is that the client wants, and, it helps the attorney consider all of the facts before reaching any conclusions. Most importantly, however, it increases the likelihood that the lawyer will quickly be perceived as someone who is empathetic and can therefore be trusted with troublesome information. Although Binder and Price go on to describe the techniques for actually practicing this theory, I

will discuss them in greater detail in the second part of this chapter since most of the theories employ more or less the same techniques.

In concluding their discussion on the initial interview, Binder and Price point out the importance of using preparatory statements. For example, it is often useful to provide the client with an explanatory statement concerning what will take place in the rest of the interview. This will help to eliminate many communication problems between the lawyer and client, as well as eliminate any incorrect expectations on the part of the client. This type of explanatory statement should be made at each transition from one stage to another. Finally, the lawyer should explain to the client why he/she is taking notes, and what use they will be put to. Continually looking down at the pen and paper might otherwise cause the attorney to appear uncaring, or cause the client to become reluctant to talk if the information is highly personal. In any event, preparatory statements preceding each of the three stages of the initial interview help both the attorney and client to have a smoother working relationship.

Team Approach

Don Howarth and Thrace Hetrick provide a second approach to the initial interview in their article, "How to Interview the Client."³ Howarth and Hetrick emphasize

a "team" approach to identifying and proposing solutions to the client's problem. They tell us that, "it is a need for an exchange of both facts and legal analysis that defines, on the most fundamental level, the goals or objectives that the lawyer must have in mind in the initial interview."⁴ But before this "team" can accomplish anything, they tell us that it is the attorney's responsibility to make sure that each of the items on the following checklist have been attended to.

1. Ease the anxiety naturally felt by the client, inspire a sense of confidence, rapport, and trust
2. Obtain and sort out the legally relevant facts
3. Make an initial determination about the merit of the client's legal context
4. Analyze the risk and potential risk of pursuing the matter in a legal context
5. Make a tentative list of approaches or procedures available for addressing the client's problem
6. Agree, with the client, on the terms and conditions of the ongoing relationship

The authors are careful to point out, however, that these are merely the ends to be sought, and the means of obtaining them are the techniques (which I will discuss in detail later.)

An interesting point is made with Item #6 in the checklist. Agreement on the terms of an ongoing relationship in the area of fee structure, amount of client contact,

estimated time to be spent on the case, etc. are crucial to the survival of the lawyer/client team. Howarth and Hetrick are the only authors to raise this point in relation to the initial legal interview, which is obviously the right time for this agreement to be reached.

Honesty and the importance of being straightforward with the client are also emphasized in this theory. For instance, at some point in the initial interview, "it is likely that the client will either demand or expect a legal opinion on the merits of his position."⁵ Platitudes and comforting support might lend emotional support, but they will also produce misunderstandings. On the other hand, a premature decision will stifle discussion. The authors point out that a good lawyer should have no hesitation in saying that he/she needs to look into the matter more carefully before giving an opinion. With all the weight riding on the initial interview, some caution here is certainly in order, they point out. Finally, attorneys are told to remind clients during the initial interview that no legal opinion can be firm until all of the facts are on record and have been fully developed.⁶

Four Stage Approach

Melvin Heller provides a third approach to handling the initial interview with professionalism in his book,

An Introduction to Legal Interviewing. In what has been termed an "interactional approach," Heller divides the interview into four stages: (1) Mutual Evaluation, (2) Information Gathering, (3) Exploration by Questioning and Confrontation, and (4) Analysis by Summary of Opinion.

The first stage, Mutual Evaluation, consists of the stage where the lawyer and client are "consciously and unconsciously busy receiving initial impressions of each other, while each participant transmits both manifest and subtle clues."⁷ Each participant, especially in the case of inexperienced interviewers, actively try to influence the other's initial impression. Suffice it to say that if the interviewer can be as natural and comfortable as possible then he is off to the best possible start.

Heller points out that in evaluating the new client, it is worth noting his superficial mannerisms and opening approach to the interview, because this approach may be a clue to the way in which the client approaches his interpersonal problems as well.⁸ This point typifies Heller's approach to the lawyer/client relationship quite well. The client is treated as a "whole person," with his or her legal problems and reactions to them being reasonable extensions of the "personhood" of the client. The author also notes that this first stage is the appropriate time to gather personal data (name, age, address) in an attempt to placate the client and make him feel

at ease with the interview process. The fact is that building a comfortable climate for any first interview is of major importance.⁹

In the second stage of Information Gathering, Heller suggests that the attorney "lean back...and ask the client a general question, such as 'How may I help you?' or 'Tell me what it is that brings you here.'"¹⁰ From here, note not only what the client says, but listen to and carefully observe the manner of presentation. The manner in which a client progresses, the use of language, the accuracy or looseness of description, etc., are valid sources of information that the lawyer may use to strengthen his relationship with the client. Admittedly, this calls for a great deal of perception on the part of the attorney, but such perceptions make the attorney's job much easier in later interview scenarios (i.e. predicting client reaction to cross examination and trial proceedings). Heller also points out in the second stage that humans can speak at 125 words per minute and listen to 500 words per minute. The situation becomes clouded, he says, when the attorney brings to the case that which the client has not imparted to it.¹¹

The third stage, Further Exploration by Questioning and Confrontation, consists of the lawyer asking the client general questions over areas the client may have omitted and specific questions aimed at eliciting facts of which the client has, or has not, specific knowledge.

The client should be approached in a spirit of helpfulness rather than challenge. Heller says that the adversary method has no place during the initial interview because "successful communication should be oriented toward mutual problem solving rather than attack."¹² This fact is especially true, and should be remembered when using confrontation as a tool to elicit information, due to the fact that it tends to unnerve one's own client.

The fourth and final stage is that of Analysis of Summary of Opinion. This stage is not considered to be complete until the client has reached a point of completely understanding his legal position, and therefore may require a second meeting. When the client does reach this point, the lawyer should then know that he may terminate the initial interview.

Prior to termination, it is necessary to review with the client the essence of the problem and its legal implications for the client in order to insure complete understanding. The attorney now uses his own words because it is assumed that the client understands the problem, as the attorney is now "advising," and giving information to the client. Mutual agreement as to a course of action can now occur.

To summarize Heller's approach, one would have to say that legal problems do not exist as entities by themselves. They are attached to humans. Therefore, the question "What is the nature of the person who experiences

this legal problem" is as important to the solution of the problem as is the nature of the problem itself.

Time Saving Approach

Willian Kraut gives us a fourth and final approach to the initial legal interview in his article, "How to Get the Most Out of Your Client - Time Saving Techniques for the Initial Interview." Kraut's approach is perhaps the most practical and realistic, but it is not as thorough. This time saving approach was developed so that attorneys who rarely do interviews or perceive themselves as being too busy to spend much time at it will have a "standard" format that is simple to follow.

Kraut first instructs his attorneys to "greet the new client with a handshake and offer a cup of coffee."¹³ Next, take out the appropriate interview sheet and begin. Standardized interview sheets for several different types of cases are available through local Bar associations. During the interview, Kraut advises telling the client that his questions will be answered just as soon as the standardized form is filled out. This assures the client that his questions will be answered and at the same time allows the lawyer to structure and pace the interview; it gives him immediate control and the respect of the client, Kraut says.¹⁴

The next step to a speedy interview is giving some sign of the lawyer's interest in the case, such as immediately dictating a letter or making a phone call to the

opposing attorney. And finally, since attorneys have been accused of being difficult to talk to after the first meeting, Kraut suggests that clients be sent copies of all correspondence, be kept up-to-date by a "paralegal" or staff member.¹⁵

Obviously, this approach is a "bare essentials" method of interviewing clients, one which differs greatly from the other three approaches described earlier. Nevertheless, this is an accepted form of initial interviewing, and is therefore deserving of our attention. Each theory represents its own approach to the same subject, and each theory has been tried and used, with varying degrees of success.

INTERVIEWING TECHNIQUES

As it was mentioned earlier, in order to implement the theories just described, the attorney must embellish the basic format with his/her own refined techniques. Although it is true that no two people will interview the same way, and that it is not possible that one format will work for every scenario, it is nonetheless necessary for the attorney to possess the basic interviewing techniques. The following is a description of several techniques which can and should be followed in the initial interview.

Listening

"The problem with lawyers," Binder and Price say, "is that they have no time to listen. They are too busy asking too many questions."¹⁶ The importance of effective listening is underscored by the authors of every major work on the legal interview. It is generally agreed that listening is the technique through which empathetic understanding is most readily communicated to the client. Thus, listening is important not simply to insure that the lawyer hears and understands what has occurred, but also to provide the client with the motivation for full and complete communication. At this point, it would be useful to identify the three approaches to effective listening.

"Active listening" is perhaps the most widely accepted approach to the interview by attorneys who have had any training in listening skills. Binder and Price define active listening as "the process of picking up the client's message and sending it back in a reflective statement which mirrors what the lawyer has heard."¹⁷ Care must be taken here not to simply "parrot" what was said, but rather to respond with an affirmative effort to convey back the essence of what was heard. In this way, the attorney demonstrates his understanding of the client's problem. It also has the benefit of being a non-judgemental response. Carl Rogers, a noted psychologist, also points

out that active listening responses also allow the client to correct or clarify any misunderstanding immediately.

Active listening has come under attack from some members of the Bar because it involves becoming involved with the client's feelings. They feel that lawyers should be concerned only with the facts and leave emotions to the psychiatrists, because lawyers aren't competent to explore client's feelings. This argument is fallacious, because the idea is not to probe the client's innermost thoughts, but merely to be empathetic in appropriate situations and to give clients a chance to talk about feelings which relate to their problem.¹⁸ Active listening in no way detracts from the lawyer's stature as a professional as some lawyers believe. In fact, clients usually welcome this approach.¹⁹

A second approach to effective listening is that of "Neutral Listening." "Ideally, the role of the attorney in listening is a neutral one," Heller advocates.²⁰ Questions, particularly leading questions, carry with them the seeds of their own answers. Further, the lawyer often does not realize that his own gestures and innuendos are equally suggestive. Therefore it is of paramount importance that the lawyer listen and formulate opinions in a neutral manner, after the client has completed his discussion.

A neutral attitude is one of professional objectivity rather than professional coldness. Without self confidence,

neutral listening becomes impossible, because the attorney is devoting too much time to self-conscious introspection stemming from how he appears to the client. In this case, professional coldness would replace objectivity. When performed correctly, however, neutral listening involves not only refraining from talking, but implies accepting and trying to understand the client's attitudes and feelings. In this way, neutral listening will not generate into painful silence, and will enhance a complete presentation of the case by the client.

The third and final category of listening is known as "Passive Listening." This theory requires the listener or interviewer to place himself in a position of relative "passivity" says its developer, Andrew Watson.²¹ For long periods of time one simply opens up one's potential to react and reverberate, and does little or nothing to interrupt the flow of communication from the speaker. There are, however, implications to passive listening.

Listening with "passivity" collides with the attitudes which many people have been taught about the implications of being in the passive role. For example, this value consideration may tap into personal images of masculinity-femininity, strength-weakness, or grown-up-child. Motives and conflicts about power are similarly tapped and these have special importance to lawyers.²² Whenever such an emotional conflict exists it will inevitably

mobilize personal defense patterns which may then cause behavior more related to internal psychological needs, than to exterior activities or problems. This defense behavior, although it provides a sense of greater comfort, is counterproductive so far as problem solving is concerned. For this reason, the interviewer must come to understand his own attitudes about listening in order to avoid falling prey to this kind of human communication risk.

The second misconception about passive listening is tht it is perceived as allowing the lawyer to lose "control" of the interview. This argument fails to realize that passivity, and even outright silence is a powerful control device. Control of an interview can only be lost when the interviewer allows it. Careful attention to the listening and other techniques described later will prevent this from happening, even to the passive listener.

Finally, Binder and Price make three distinctions within the "Passive Listening Category." Silence, the first distinction, is a brief but definite pause in the conversation. Effective lawyers often wait out the pause and allow the client to reflect before continuing with the story. Noncommittal Acknowledgements, the second distinction, are responses such as "Oh," "I see," "Interesting," or "Mm-hmm." These acknowledgements let the client know that the lawyer is in fact taking in what

is being said, even though he isn't saying anything, or making any evaluations. Open-ended questions are the third and final distinctions. To get the ball rolling again after a prolonged passive pause, the lawyer may ask a question such as, "What else happened?" This allows and encourages the client to continue with the story at hand, but they do not communicate that the lawyer understands or accepts the client's messages.

Although the distinctions between active and passive listening are rather faint, one point is important to remember. Active listening communicates back to the client that what was said was actually understood. Passive responses imply only that the lawyer has heard.

Questioning

Once the interview has proceeded past the point of introduction and the client has told the lawyer "his story," it is up to the attorney to probe further into the matter by asking several questions of the client. In this way, the lawyer is able to ascertain the full depth and breadth of the client's problem, and ultimately propose a proper solution. There are several types of questions which each perform specific functions, elicit specific information, and obtain that information in a desired, logical sequence. The following is a discussion of these question types and sequences.

Open-ended questions are classified in terms of the breadth of information that they seek to elicit.

These questions allow the client to select either the subject matter for discussion or the information related to the general subject which the client believes is pertinent and relevant. These questions are called open-ended. An example of these types would be, "Can you tell me what brought you here?" and "what happened after the police entered the room?" The client is given a substantial range of subject matter, and selects that data which he feels is appropriate. Obviously, open-ended questions are most useful in the initial interview where the lawyer seeks to obtain as broad of an information base as possible from the client. Conversely, when specific details are required, another type of question is best used.

Further advantages of open questions include providing an open climate for the client to get troubling information "off of his chest," to report observations without interruption for specific detail, and assist the client in overcoming ego threat, case threat and trauma.²³ On the other hand, open-ended questions are less advantageous because (1) they do not provide minute details necessary for a complete description, (2) they provide little memory stimulation, and (3) they tend to be discomfoting to clients who are reluctant to talk to begin with.

The closed question is the exact opposite of the open-ended question. As its name implies, the type of answer

required of this question is strictly closed, or more precisely, limited. For example, the question, "What time did you leave?" requires only a specific, or closed response. The attorney neither requires nor desires more information from the question than this. He is not interested in the events leading up to the time the person left, who left with him, etc. When used, closed questions have the advantages of saving time and energy in the interview, maximizing control over the interview, making tabulation responses easier, trying to reconstruct an event, when the client is shy and/or reluctant to talk, and when the answer does not require an explanation. On the other hand, closed questions sometimes limit the amount of information an attorney can obtain, limit the client's need to talk about the answers, and make falsification of answers easy.

With these strengths and weaknesses in mind, the use of closed questions by attorneys is kept to somewhat limited situations. Instances where they are beneficial include the cross examination of another witness to build a case, when a specific point is being made during the taking of a deposition, and when trying to discover the facts of any case in detail.

Another type of question lawyers may use, albeit with discussion, is the Leading Question. The structure of this type of question provides all of the data which

the lawyer believes is pertinent and relevant. It makes a statement and, in addition, suggests that the client ought to affirm the validity of the statement. Thus, it does more than set forth the relevant data and ask for affirmation. It also suggests what the answer should be. An example of a leading question might be, "You're related to the defendant, are you not?"

The disadvantages to using leading questions, either intentionally or not, are fairly obvious. Since they suggest an answer, they tend to increase the likelihood of distortion. To the extent that the client feels that rejection of the suggested answer will lower the lawyer's perception of merit of the case, the temptation to go along with the suggestion will be almost overwhelming.

Downs, et al., have divided the leading question into several possible forms. For instance, a question will be considered to be leading if it contains "emotionally loaded language." Secondly, "identification with the expected answer" significantly increases the possibility of a particular answer, especially if the person asking the question is in some position of power. Finally, the use of "prior statements" to indicate the correct answer is a frequently used form of leading questions.²⁵ The common denominator here is that all of these forms sell the client/witness on a specific response. This gives the interviewer considerable control. When the

interviewer desires honest answers, the leading question is best avoided.

Another question type is that of the "bipolar" question. In this situation the client or witness is limited to one of two possible choices by the attorney asking the question. The purpose of using this type of question is to make the interviewer give a general reaction. For instance, the question of "Do you approve or disapprove of the verdict handed down by the jury?" does not allow for any degrees of agreement or disagreement. Furthermore, it fails to take into account the fact that the person may not ever have an opinion about the verdict. The major uses of the bipolar question tend to be when the attorney wants to elicit a specific response from a client, prove a particular point, or eliminate the possibilities of alternative issues clouding the problem at hand.

Question Sequences

Although this discussion of question types is by no means exhaustive, it does cover the available material on question types as it pertains to the legal interview. An in-depth discussion of the questions "sequences" used in witness interviewing settings would be out of the scope of the purpose of this paper. However, for the purpose of definition, and since they are occasionally used in other attorney/client interviews, I will briefly discuss one of them now.

The "funnel sequence" of questioning explores a topic by employing a series of open-ended questions at the beginning. These questions are used to get at the facts which the client is able to recall. When these questions are no longer productive, the lawyer employs a series of narrow questions. These are used to ask about those possibilities which the lawyer has thought of but are not mentioned in response to the open-ended questions. In using the funnel sequence, the lawyer makes more than one attempt to determine what the client can remember before narrowing down and attempting to get a picture of the subject by asking about specific items.²⁶

There are two major advantages to the funnel sequence. First, it allows both the client and the lawyer to exhaust their respective senses of relevancy. Second, it provides for wide memory stimulation by exhausting both recall and recognition.

Note Taking

During the initial interview, some note taking is essential; without it, there is a substantial likelihood that important information will be forgotten. The most difficult part of note taking is deciding what to write down. If everything the client said were written down, it would be impossible to keep the interview moving at a reasonable pace, or to maintain adequate eye contact. On the other hand, if only that which immediately strikes

the lawyer as important were written down, there is a real danger of omission. Matters which initially seem irrelevant, and which become meaningful only in the light of subsequent information, may become lost.

Binder and Price suggest that during the Overview Stage of the interview, the attorney should jot down key words as each new topic is introduced. This will serve as a reminder of the topic's existence. During the Theory Development Stage, these words can be used to re-introduce the subjects which need a more detailed investigation. The use of the client's own words will demonstrate that the lawyer was listening, and may help stimulate the client's own memory. During this stage, note taking should be more extensive since more detail is being elicited, and since the lawyer is being more certain that salient information is being obtained. Finally, after the client has left the office, while the meaning of key words is still fresh, prepare a detailed memorandum of the facts. Binder and Price rate this procedure as being essential if one is taking notes in abbreviated form. Failure to do this, after even a short period of time, will leave the lawyer without a detailed description of the facts.²⁷

There are, however, several drawbacks to extensive note taking during the interview. Heller comments that "when the lawyer is writing, the client assumes, not

without reason, that the lawyer must think that this material is important."²⁸ Hence, the client may tend to pursue this train of thought. The end result is that the lawyer unwittingly encourages the client to talk about certain material, and conversely, by not taking notes, may discourage the same client from talking about other material.

Next, the lawyer should always remember that the give and take of conversation during the interview is usually stifled by note taking. If at any point in the interview the lawyer notices the client's direction beginning to fade, or if the amount of information being provided suddenly slows, this is a good clue to stop taking notes for a minute and concentrate more carefully on the client himself.

In order to avoid confusion, the lawyer should always carefully explain to the client at the beginning of the interview that he's going to take notes, that they are confidential, and (as a few authors have suggested) that they are welcome to see the notes if they so desire.

Finally, before the client leaves, it is helpful to review with the client the material which the lawyer has put on paper so that its accuracy may be assured. This is much the same as active listening in this respect. It acts as a safeguard against the lawyer "language bias" and possible errors in transcription.

Interview Environment

A seemingly obvious, but often overlooked aspect of the initial interview is the preparation of the setting in which it will take place. Lawyers will be interviewing clients in variety of locations such as the jailhouse, their own office, homes, working places, etc. The cardinal point to remember is that whenever the interview takes place, the setting will stimulate reactions, and their consequences should be scrutinized closely.

Thomas Shaffer suggests that the physical setting of the interview should be in neutral territory.²⁹ Preferably, the location for the interview would be mutually decided upon by both the lawyer and client, with consideration being given to the nature of the client's problem. Although most clients will naturally assume that the interview will take place in the attorney's office, the lawyer cannot also make this assumption. The client who feels threatened to express himself openly in the lawyer's office will not be able to express himself fully or comfortably, and thus hinder the success of the initial interview.

Once the location has been chosen, care must be taken to choose the setting with several things in mind. Complete and equal flow of communication rarely takes place when the interviewer is sitting in a large chair behind a cluttered desk. The client in this situation

will likely feel separated from the attorney. A better arrangement might be at a circular table in two similar chairs, at either the lawyer's office, a coffee shop, or wherever the client feels comfortable. Of course, if for some reason the attorney wishes to keep the client relationship at some distance, either in the initial or subsequent interviews, the room should be arranged with this in mind.

The physical distance between the attorney and client in any interview scenario will also effect communication. The attorney should be sensitive to the client's desires and needs in this area. Arranging the chairs so that the client has either a choice of places to sit, or so that he/she has a choice in where to place the chair will provide the attorney with several nonverbal messages. For instance, if the client chooses to position himself further away from the attorney, then the level of communication will tend to be lower. Andrew Watson points out that it is difficult if not impossible to conduct a high quality interview that will cover all relevant issues when the client is more than a few feet away from the attorney.³⁰ On the other hand, if the arrangement is such that the client feels his "space" is being invaded, then there is a tendency to "back off," both verbally and emotionally, from the interview. There are no specific rules for arranging physical distance. Rather, the attorney

should be sensitive to the reactions of the client and make physical distance judgements accordingly.

Finally, care must be taken to ensure that seemingly unimportant factors such as room temperature, lighting, noise level, degree of privacy and room arrangement have all been thought about and taken care of before the client arrives. Any one of these factors can adversely effect the quality of the interview. Since high quality interviews are the first step in the direction of a mutually advantageous attorney-client relationship (and ultimately of problem resolution as well) the attorney cannot overlook the details of the interview environment.

Effects of Legal Language

Earlier, legal counseling was defined in a way that included helping the client reach a satisfying solution to his or her problem. Effective counseling requires the development of effective communication skills. However, this is not nearly as easy as it sounds.

Law students, from their first day in Law School, spend a lot of time learning to "sound like" and "talk like" lawyers. They never give much thought, nor are they encouraged, to learn to explain legal concepts and principles to nonlawyers in a language that they too can understand. Indeed, too many lawyers seem to believe that "unless they use polysyllabic words freely interspersed with latin phrases and legal jargon, their clients

will not respect them."³¹ The result is that lawyers frequently think they have explained something only to find out later, much to their regret, that the client didn't understand a word they said.

To complicate this problem, clients will usually be afraid to tell their legal counselors when they do not understand something. Some are too embarrassed to admit it; some are intimidated by the lawyer; some think they understand and only later realize that the lawyer did not mean what they had thought.³²

The legal counselors, and in this case they are just that, must know both what to tell the client, and how to communicate it effectively. Otherwise, the effectiveness of the entire interview, and possibly even the client-attorney relationship, will be lost.

As we can see, there are several potential barriers to an effective legal interview. The careful attorney is aware of and makes appropriate use of each of the techniques just described. By doing this, the chances of being "snagged" by one or more of the barriers is greatly reduced.

THE FREEMAN STUDY

In 1964, Harrop Freeman conducted a survey titled, "Counseling: A Study of Lawyers, Doctors, and Clergymen." This study included questioning practitioners in all three areas as well as a survey of the nature of the

graduate institutions which they attended. Although the Freeman study is similar to this one, its approach was significantly different. The researcher sought to discover how extensive the training of these professionals was in the area which this thesis strictly defined as counseling. More specifically, lawyers were questioned on "counseling" skills rather than "interviewing." Nevertheless, the results from this study will show that in the 20 years since the study was done very little has changed either in the training of lawyers, or in their attitudes towards counseling clients.

The study surveyed 99 members of the American Association of Law Schools and found several things. First, less than 10 per cent of the schools considered an applicant's interest or ability in counseling when selecting students.³³ My research found that this is even more so today (6 per cent). This lack of use of counseling ability or interest as criteria is due to lack of desire by the law schools to consider this factor. Additionally, the proportion of students who have pre-law majors in psychology, sociology, social work, etc. was found to be very low. As this is still the case, it is not surprising that law school attitudes about counseling ability has not significantly changed.

Another attitude held by the schools that has not significantly changed is that the client and his emotional problems are rarely seen or thought of as "legal" problems.

Although the schools did (and still do) agree that counseling is a part of the legal profession, and that it can be taught, most law schools are not attempting to teach it.

Freeman also found that law schools generally do not have faculty adequately trained in either interview or counseling theory, method, or teaching.³⁴ There are in about 50 per cent of the schools one or two persons per faculty "interested" in the field. In the process of legal education the articulated values and personality patterns of the student are reshaped into the professional image. "This had already been studied and confirmed (and our results confirm) as to cynicism, humanitarianism, optimism, and our study would add as to ethics, goals, values, authoritarianism, conservatism, security, social and professional conformity, definition of the lawyer's role."³⁵ Freeman therefore concluded that the professional image thus created and inbred is unfavorable to the counseling role. "Such attitudes of the lawyer as his being a 'doer,' a technician, a person whose legal knowhow is a product sold for a fee, and his apologies for fees for general counseling, are one evidence of this."

In making suggestions to the law schools on how to improve in this area, based on his research, Freeman concluded that the schools should:

- a) test and counsel their students as to those traits conducive or inseminal to good legal counseling

- b) give courses in interviewing and counseling of an explanatory kind to alert the student to the field
- c) develop further materials...usually by groups or individuals studying legal counseling
- d) continue to conduct studies of lawyers and clients as to counseling, and share these with students
- e) improve the training of some faculty members in counseling³⁶

Freeman's conclusions concerning the law schools state that "counseling must be recognized as an important part of law practice, that certain types of students make good counselors, that law schools should make an effort to select such students, that counseling can be taught, and that law faculties are now inadequately trained."³⁷

In qualifying the results obtained from the lawyers, Freeman described the "Model Lawyer," or that lawyer which most clearly represented the statistical mean response for each question. The model lawyer averaged 1/2 to 1 hour per interviewing session in 1964. This thesis research will show a difference here in Chapter 4. Few lawyers had received any training in counseling (less than 5 per cent) and defined counseling as one with superior competence advising one less competent. Nonetheless, he admits to having very little actual training in counseling, and did not know if he would have taken it, had it been offered. They tended to counsel

not because it was a "worthwhile" or necessary activity, but because it is a "part of the job." Further, they rated professional experience and interest or empathy in others as their best counseling qualifications.

Freeman also found that the response to the questionnaire from the law schools was surprisingly good while the responses from the lawyers was surprisingly poor. In more cases than not, the lawyers in both surveys were resistive to the questionnaire as a whole, and to the open-ended questions in particular.

In many ways, both the methods and results, if not the approach, of the Freeman Study of 1964 closely approximated that of this thesis, as the results of Chapter 4 and the conclusions in Chapter 5 will show. Unfortunately, in the past 20 years, not very much has changed. Although the Freeman Study has been called "seminal" in its field, and several respected authors such as Binder and Price have used his results to prepare their own textbooks, the actual instruction of legal counseling is still of very low quality.

ENDNOTES

¹David A. Binder and Susan Price, Legal Interviewing and Counseling: A Client-Centered Approach (St. Paul: West Publishing Co., 1977), p.53.

²Ibid., P.54.

³Don Howarth and Thrace Hetrick, "How to Interview the Client," Litigation, (Vol.9, No.4) 1983, p.25.

⁴Ibid.

⁵Ibid., p.28.

⁶Ibid.

⁷Melvin S. Heller, Ester Polen, and Samuel Polsky, An Introduction to Legal Interviewing. National Legal Aid and Defender Society: 1960, p.10.

⁸Ibid.

⁹Cal W. Downs, Paul Smeyak, and Ernest Martin, Professional Interviewing (New York: Harper and Row, 1980), p.74.

¹⁰Heller, p.11.

¹¹Ibid.

¹²Ibid., p.14.

¹³William D. Kraut, "How to Get the Most Out of the Client," Docket Call, (Vol.17, No.4, 1983), p.20.

¹⁴Ibid.

¹⁵Ibid.

¹⁶Binder and Price, p.20.

¹⁷Elliot Evans, "The Neglected Science: Training Counselors-at-Large to Counsel," New York Law Journal (188, No.48, 1982), p.7.

¹⁸Ibid.

¹⁹Ibid.

²⁰Heller, p.28.

²¹Dr. Andrew S. Watson, Legal Counseling (New York: AMA Publishing Co., 1974), p.29.

²²Ibid.

²³Binder and Price, p.41.

²⁴Downs et al., p.47.

²⁵Ibid.

²⁶Binder and Price, p.92.

²⁷Ibid., p.27.

²⁸Heller, p.19.

²⁹Thomas Shaffer, Legal Interviewing and Counseling - In a Nutshell (Chicago: ABA Press, 1973), p.89.

³⁰Watson, p.5

³¹New York Journal p.4.

³²Ibid.

³³Harrop A. Freeman, Counseling in the United States (Brooklyn: Oceana Publications, 1967), p.231.

³⁴Ibid.

³⁵Ibid., p.233.

³⁶Ibid.

³⁷Ibid., p.234.

CHAPTER 3 SURVEY METHODS AND PROCEDURES

DESIGN OF THE STUDY

Two different research questionnaires were used to solicit information from two groups: lawyers and law professors. Questionnaire A surveyed a random sample of lawyers. Of the sixteen questions on Questionnaire A, eleven were closed, lending themselves to statistical analysis; the five remaining questions were open-ended and lent themselves to allowing open expression by the lawyers. The questionnaires were mailed to 500 attorneys selected at random from the Martindale & Hubbel Directory of U.S. Attorneys. This sample represents attorneys from all parts of the country and represents legal educations received at 48 different law schools. Participation was strictly voluntary, and no rewards for participation were offered.

Questionnaire B was sent to professors from each of the 112 American Bar Association (ABA) approved law schools in the United States. Selection of the professors was based on information provided by the ABA. These professors are the contacts the ABA uses to solicit participation in its Client Counseling Competition. It was felt that they generally represented the persons most qualified to address the questions concerning instruction of communication skills at his/her own law school.

Of the thirteen questions asked of the professors, nine were closed and allowed statistical analysis; four were open-ended. As with the first questionnaire, participation was solicited, but strictly voluntary, and no rewards were offered for participation.

SUBJECTS

Questionnaire A

Completed questionnaires were received from 106 lawyers, comprising over 20% of the survey population. Of those attorneys responding to the questionnaire, the average number of years spent practicing law was 12. The range was from one to sixty years, with the median being nine years. There were eleven different undergraduate degrees received from 48 different institutions. The most common response to the legal specialization question was "litigation," although nine different areas were represented as well. (See Table 3.)

Questionnaire B

These subjects were law professors selected specifically for their assumed ability to give the most accurate answers to the questions concerning legal interviewing and counseling skills taught at their respective schools. The list of professors supplied by the ABA included those professors in charge of Client Counseling Competition,

a competition involved in improving the oral communication skills of law students. Responses were obtained from 54 schools, or 49% of the survey population. This high response level is likely due to a combination of questionnaire brevity, ease of return and a desire to participate in an area of research in which they would be interested or personally benefit from the results. An equal representation of public and private schools was obtained.

PROCEDURE

Participants in both surveys were asked to complete the questionnaire and return it in a stamped, preaddressed envelope. Anonymity in both questionnaires, was assured although several participants enclosed a return address and requested a copy of the results.

In analyzing the results of the questionnaires, a one-way analysis of variance from the Statistical Package for the Social Sciences Computer Program was used. The analysis involved: 1) frequency counts, 2) statement comparisons among groups, and 3) content analysis of the answers to open-ended questions.

RESEARCH QUESTIONS

Questionnaire A

The questions were designed with the intention of

first determining the amount of time lawyers spend interviewing or counseling their clients, and how well the lawyers felt that their legal education had prepared them for this activity. Next, the issue of ethical examination of clients was researched. Finally, the lawyers were asked to describe their client examination styles and techniques.

Questionnaire B

Those responding to this questionnaire first answered questions involving the percentage of the student body which received instruction in client counseling. Subsequently, a comprehensive description of courses dealing with client examination was completed. Subjects were also asked whether they felt client examination can and/or should be taught as part of a law school curriculum.

CHAPTER 4 SURVEY RESULTS

QUESTIONNAIRE A

Single Variable Analysis

Importance of Legal Interviewing

The questionnaire given to lawyers sought to find several things. In order to make a statement about the importance of the training received in legal interviewing, it was necessary to determine the amount of time attorneys spend actually interviewing and/or counseling their clients. The research shows that the average attorney spends 24% of his/her time in these situations, with half of them spending 20% of their time, and another 37% spending up to 40% of their entire working time in an interview. The allocation of this much time to interviewing makes it a major investment. Furthermore, when meeting a client for the first time, the average attorney spends between 60 and 75 minutes in the interview. Thirty per cent of the respondents reported spending over an hour and a half with a new client.

All of the data above indicates that communication between the attorney and client is a major aspect of the attorney's job. And it would seem that the education and training which lawyers receive in their three years of law school would include teaching attorney/client

communications skills. However, the lawyers reported that this is not the case. When asked to describe their education in interviewing and client examination, few could mention anything substantial. For instance, only 40% reported having any "special training" in client examination. Of these, only 11 per cent received training through required coursework. Others reported that optional seminars, experiences in moot court or the Client Counseling Competition were the only instruction in client examination they received during law school forty per cent said that "on the job experience" was their first contact with client examination.

When asked if lawyers COULD be trained to improve their client examination skills, 89% of the lawyers either agreed or strongly agreed, with only 5% disagreeing. The question about whether lawyers SHOULD have special training in client examination brought a similar response; 77% agreeing and only 8% strongly disagreeing. This would seem to indicate that not only do attorneys feel that they CAN be trained to improve their skills, but that they SHOULD be given the opportunity to do so. Those taking exception to this did so for reasons concerning their area of legal specialization. For example, 9% of the attorney's surveyed practiced tax law. They have little need to "interview" clients and, therefore, tend to feel that legal interviewing skills are "unnecessary."

Indeed, from their points of view, they may be partially correct. Nevertheless, for the remaining 91% of the legal profession, these skills are valid and necessary, according to the attorneys themselves.

The survey identified four of the major client examination scenarios and asked the attorneys to rate the importance of each, from "not important" to "very important." The four scenarios listed were: (1) the initial interview, (2) deposition taking, (3) trial proceedings, and (4) cross examination. The results in Table #1 demonstrate that the attorneys found client examination skills to be "very important" in each scenario.

TABLE 1

Next, the attorneys were asked "to what extent do law schools need to improve the training of lawyers in the area of client examination?" Ten per cent said "not at all," 35% were uncommitted, and the remaining 55% said "very much." From this, it seems clear that there is a strong feeling among the legal profession that, (1) they spend a substantial amount of their time interviewing clients, (2) lawyers can and should be taught these skills in law school, and (3) the current method of instruction does not adequately train law students in this regard.

Ethical Issues

The next area covered in the survey dealt with the ethical issues involved in the legal interview, including (1) emotional involvement with a client and (2) types of questions.

When asked, "To what extent does emotional involvement destroy objectivity in a legal interview," 21% said it had little or no effect, 35% were neutral, and 64% reported that it completely destroys objectivity. In answer to the question "To what extent do lawyers become emotionally involved, for whatever reason, in their client's cases," 39% said "often to very often," 38% remained neutral, and 23% said "rarely to never." Responses to this question were fairly well spread out, yet slightly skewed in the direction of some emotional involvement. This is a little surprising, since many attorneys feel that this involvement could destroy their objectivity. "Emotional involvement," of course, is a highly abstract term. In an attempt to discover how this emotional involvement could occur, the lawyers were asked "in what ways" emotional involvement in a client's case could occur. The largest percentage said it was due to a genuine "desire to help the client." When referring to "other" attorneys, several mentioned that emotional objectivity was often at its lowest when the attorney had financial gain at stake in the outcome of the case, as in when the fee is based on a percentage of the settlement.

In any event, since communication between the attorney and client is the basis for the type of relationship which develops, it was necessary to determine what types of questions attorneys felt were "unethical" in interview situations.

TABLE 2

For the initial interview, "threatening" and "missed" questions were considered to be by far the most unethical, although a smaller, but still significant, percentage included "leading," "bipolar," and "emotionally loaded" questions as being "slightly unethical." "Threatening" questions were the only category of questions marked as unethical for attorneys to use when taking a deposition. Questions such as, "Mr. Jones, are you fully aware of the penalties for perjury?" were felt to be unethical due to the way in which they tend to influence the interviewee to change his or her answer.

Questioning Style

When asked to describe their own styles of questioning during the initial interview, (Questions #11 and #14) attorneys reported using an "open" style, where the client does most of the talking and the attorney asks many questions. Most (57%) reported preparing or using a standard prepared outline of questions to guide them through the interview. A smaller percentage (31%) reported taking notes during the interview "to help remember key facts." None of

the attorneys reported taping interviews, although a few said they would do this if it did not tend to make the client nervous. In answering the open question to describe their "style" of interviewing, several attorneys said that they basically "acted as a moderator." By this, most explained that by allowing the client ample time to describe the problem, and by probing into the relevant issues, they were able to "get the most out of the client in the shortest amount of time." For initial interviews, the "most frequently" used question types were closed, funnel, and hypothetical, representing 23%, 26%, and 27%, respectively.

Question 15 asked the attorneys to describe how an "expert" attorney would develop a line of questioning while taking a deposition. Several participants either left this question blank, said they had "never taken a deposition before" (tax lawyers, for example), or said they did not have time to write it all down. Since this was the last question on the questionnaire, some participants may simply have gotten tired of writing or felt overwhelmed at answering a question they perceived as being too difficult to put on paper. However, those who did answer tended to give thorough, in-depth answers (19 participants). An example of one such answer that basically incorporates all of the points made in the other responses can be found in the Open-Ended Analysis. In short, however, most attorneys developed a rapport

with the witness, followed an outline, used some "form" of questioning to build a base of information, covered all possible points, and used "short, pointed questions that cannot be denied later."

Cross Variance Analysis

In order to provide for a more specific analysis of the data collected from the participants, a one-way analysis of variance using a two-tailed T test was performed at the 0.05 level of error. Analyses were performed with the participants divided by their years of experience, undergraduate degrees, legal specialty, and by the amount of time they spend examining clients (independent variables). In this way, it was possible to obtain more specific information about the basic research questions. The following is a description of the results.

Experience

The first analysis was performed with the lawyers divided into seven groups according to their years of experience. The groupings were:

- I 0-5
- II 6-10
- III 11-15
- IV 16-20
- V 21-25
- VI 26-30
- VII 31+

Several interesting points were found here. First, younger lawyers (groups I-II) spend significantly more time in the initial interview than do lawyers with more years of experience. A possible, though unconfirmed,

explanation for this is that more years of experience allows for a more efficient use of time and expert use of questioning strategies that obtain information more effectively. Supporting this is a second analysis of years of experience by the amount of legal interviewing education received solely as a result of "on the job" experience. Lawyers in groups IV, V, VI, and VII received little to no formal training in legal interviewing, and, in fact, relied significantly more upon "on the job" training than did the participants from groups I, II, and III.

Second, participants from groups V, VI, and VII gave significantly stronger responses to the questions concerning the loss of objectivity through emotional involvement with clients. These groups felt more emotional involvement with their clients and that this involvement more completely destroys objectivity than did the other groups. The main reason given for the emotional involvement were "the complex relationships, both social and business," That lawyers tend to develop with their clients as the years go by.

Third, the questioning styles of attorneys with more years of experience are also significantly different from groups I and II. Lawyers from groups V, VI, and VII reported that they ask either closed or bipolar questions. On the other hand, attorneys from groups

I-IV use significantly fewer leading and funnel questions.

Fourth, lawyers with different academic backgrounds were found to behave differently. The participants in Questionnaire A were next divided into groups by their undergraduate degree. Business, Political Science, Economics, History, English, Accounting, Journalism, and Engineering majors were represented in the survey and used for the analysis. This analysis was performed in hopes of providing clues as to how the educational background of an attorney might effect his/her approach to the area of legal interviewing. It was determined that Accounting, Engineering, and Economics majors spent significantly less time in the initial interview than did the other majors. English, Journalism and Business majors gave significantly stronger "yes" responses when asked if lawyers could be trained to improve client examination skills than did the rest of the population.

The amount of emotional involvement experienced with their clients was significantly lower among lawyers who had received Accounting degrees. Furthermore, Accounting and Economics majors felt much more strongly that any emotional involvement would completely destroy professional objectivity. These results would seem to indicate that those attorneys with more "technical" backgrounds have less tolerance for emotional involvement and its possible effects. However, it is interesting to note

that Economics, Engineering, and Accounting majors were also those who felt most strongly that law schools do need to improve their instruction in client examination.

Fifth, when the undergraduate degree variables were checked against the years of experience, it was hoped that there would be a trend showing what degree lawyers have had in the past, and what degrees attorneys are graduating with today. In fact, there was a trend moving away from the traditional liberal arts degrees, (History, English, etc.) toward Business and Accounting. The analysis has already shown a correlation between these "technical" undergraduate degrees and legal specializations in areas such as taxation. If we remember that attorneys with these backgrounds are also those who expressed a need for more instruction in client examination skills, then it would be logical to conclude that the need for this type of coursework will only grow in the future.

The conclusions drawn from the previous analysis are again confirmed, and even amplified, when the variable analysis is performed using the variables of legal specialization. For instance, all but corporate attorneys felt significantly stronger than the mean response that law schools need to improve the training of students in client examination. When asked whether lawyers can and/or should be trained to improve their client examination skills, the most resounding "yes" answers came

from trial, general, and malpractice lawyers, who felt almost twice as strongly as the rest of the survey population; presumably due to the extensive use they must make of these skills themselves. It is interesting, but understandable, that malpractice and estate planning attorneys spend the most time interviewing clients, since the nature of their specializations require extensive attorney/client communication. On the other hand, real estate, tax and corporate lawyers spend the least amount of time in client examination.

Sixth, another cross examination of variables was performed with the answers to the question dealing with the percentage of time attorneys spend examining/interviewing clients or witnesses. The survey population was divided into groups one through five; these who spent 0-20%, 21-40%, 61-80%, and 81-100% of their time interviewing. Not surprisingly, the groups who spent larger amounts of time with clients also spent significantly more time and put significantly more emphasis on the importance of the initial interview. Another significant factor is found when comparing the amount of time spent interviewing clients with those lawyers who have received special training in client examination. Those attorneys who have had special training spend over three times as much time with their clients than those who have not (mean scores of 6.7 for those who have vs. 1.5 for those

who have not on a scale of 1 to 7). This fact takes on increasing significance when it is pointed out that, with training, the more time spent with clients, the more relevant the information that can be obtained. Finally, the cross analysis with the variable of the need to improve training of lawyers in the area of client examination shows how one group can spend the least amount of time interviewing clients (most because they have little or no need to do so) also felt that there was little or no need for schools to make improvements in the instructions of client examination. Although this might have been expected, its importance cannot be overstated. When those lawyers who have little or no need to interview clients are removed from the sample population, the results of the question on improving client examination skills are greatly affected; the mean score changes from 2.4 to 2.05, as it effectively eliminates the "not at all" category.

QUESTIONNAIRE B

Single Variable Analysis

Questionnaire B was sent to each of the current ABA approved law schools in an attempt to ascertain the type of instruction law students receive in the area of legal interviewing and client examination. The goal was to determine whether or not a theory existed as to

where the "practical" preparation for the practice of law lies. The following is what was discovered through analysis of Questionnaire B.

Of all of the schools responding to the survey, only 50% offer courses dealing, in whole or in part, with client examination. Additionally, only five of the schools required this course to be taken before graduation. If these results can be expanded to be indicative of all law schools (and they can, since the survey population is approximately 50% of the entire population), then only 10% of the law students graduating each year are required to learn anything about client examination.

When a school does not offer a full course dealing with client examination or legal interviewing, it might be possible to substitute outside lectures or seminars. The survey found, however, that only 11% of these schools make "often" or "frequent" use of this alternative, and 68% reported "never" or "rarely" making use of them. Twenty per cent responded "sometimes." Although when offered, these seminars might enrich the student training, the survey found otherwise. In 88% of the schools, students "rarely" attend these seminars or lectures. In only 3% of the schools do students "frequently" attend these presentations. The remaining 9% of schools report that students make "moderate" use of them. This indicates that unless material is presented in a formal classroom

setting, most students simply do not have either the time or interest to study client examination or legal interviewing.

Question number 6 dealt with the percentage of students who received practical instruction at any point in the school's curriculum in each of four interview scenarios. This would include "independent" instruction in moot court, participation in the Client Counseling Competition, or attending lectures, seminars, etc. The results were:

Initial interview, less than 50%;
deposition taking, less than 20%;
trial examination, 48%, and
cross examination, 43%.

They take into account all possible sources of introduction to legal interviewing skills.

The results of the following questions represent the philosophy of the school toward instruction in interviewing skills. Answers to the question "How important are client examination skills to the practicing attorney?" were divided into 3 categories; very important, moderately important, and not important. "Very important" received 78% of the responses, "moderately important" received 6%, and the final category received .01%. However, when screening applicants for admission to law school, 90% of these same schools reported "rarely or never" giving consideration to students with interest or ability in

interviewing. Nevertheless, 94% of the schools agree that legal interviewing skills CAN be taught to law students, and 90% either agree or strongly agree that these skills SHOULD be taught. Why then, if these skills can and should be taught, are they not?

Cross Variable Analysis

As with Questionnaire A, a one-way analysis of variance, using a two-tailed T test at the 0.05 level of error was performed. The analysis was performed using school size, whether client examination CAN be taught, and whether client examination SHOULD be taught as independent variables. In this way, a more specific meaning and significance may be inferred from the results. The following is an analysis of these results.

For the variable "school size," the schools were divided into three groups. Group I had an enrollment of 0-333 students, Group II had 334 to 666 students and Group III had between 667 and 999 students. It was found that school size had no bearing on whether or not a school offered classes in client examination, or if these classes are required for graduation. However, Groups II and III did make significantly more use of lectures and seminars to teach client examination than did Group I. But when these events are offered, the responses show that students in Group I schools make much more use of them than do students in Group II or III. This means that there is

a larger percentage of participation in smaller law schools. Of the four areas in which client examination skills were researched it was found that students in Group I schools receive far more formal instruction in the initial interview and the cross examination, possibly due to the ability of smaller schools to offer personalized instruction with greater ease than larger schools. Finally, there was no significant difference among Groups I, II, or III when asked, "How important client examination skills are to the attorney," "Whether client examination CAN be taught," and "Whether client examination SHOULD be taught."

In comparing schools that do offer entire classes dealing with legal interviewing to those schools that do not, two areas were found to differ significantly. First, for schools that do offer such classes, the perceived degree of importance of legal interviewing skills to the practicing attorney is much higher than for those schools that do not offer such classes. Secondly, schools that do offer the classes also gave significantly stronger positive responses to the question of "whether legal interviewing skills CAN be taught." In a related issue, it was also found that in those schools which feel legal interviewing CAN be taught, there is a significantly stronger feeling that legal interviewing skills are "very important" to the practicing attorney. Not surprisingly,

this fact was found to be true without exception in the survey. Finally, an equally strong degree of statistical significance was found to exist between schools that feel interviewing SHOULD be taught and those that feel these skills are "very important" to the practicing attorney.

ANALYSIS OF OPEN-ENDED QUESTIONS

Questionnaire A

On the basis of their responses to the open-ended questions, two questions have been chosen for presentation here. These particular responses have been chosen because they best represent the attitudes expressed by the lawyers. The verbatim answers are listed here, and the conclusions drawn from these answers will be reported later.

Question 14 Please describe your style of questioning during the initial interview.

1. "I prepare an outline for an initial interview. I start the interview by visiting with the witness and letting the witness discuss the events in his or her own words. This permits me to get the 'flavor' of the testimony. I take just enough notes during this initial phase of the interview to capture some point that I might forget. After the first phase is completed, then, I go through the interview in a more formal manner making use of the information that I obtained during Phase I, consulting the outline to make certain that I don't miss any important area of inquiry. Prior to the question phase of the interview, I try to get acquainted with the witness and put the witness at ease."

2. "I try to put the client at ease, to assure the client that I am interested and will help. I may use leading questions at first and move to more open-ended questioning as the client relaxes and begins to open up. I usually ask for events in the priority the client chooses, e.g. personal involvement vs. chronology. I may then seek a summary of events in an accurate chronology."

3. "I try not to sit across a desk, but either next to them or at a round table. I try to find out about family, hobbies; relate some of my experiences to try and get them to feel at ease before we start talking about property and planning."

4. "Narrative, to elicit as much information as possible."
5. "Tell me everything you know good and bad about your case. What is the other side going to say?"
6. "Friendly, thorough, concerned about the specifics of the client's problem or business."
7. "Let the client talk as much as possible, although I attempt to guide him or her to the relevant areas."
8. "Relaxed -- let the client talk -- find out his specific needs from me -- explain what I may be able to do for him and what I cannot do for him."
9. "The initial exam in litigation is for the purpose of determining whether a cause of action or a defense exists. It is fact oriented and geared toward my learning all the facts quickly as well as my advising the potential client of what to expect."
10. "There is no consistent 'style.' Interaction chronograph studies would indicate that I would be fairly passive verbally, but with much 'body language response' -- head nodding, etc."
11. "The key is to obtain all relevant facts, even the bad ones, and to force the client to examine the problem closely to determine what is the result he really wants."
12. "The 'style' of questioning during the initial interview will vary considerably depending upon the purpose of the initial interview. The only way I can imagine answering this type of question is by stating that the 'style' must be directed by the purpose of the initial interview, which purpose is to obtain all information relevant to the facts and issues, which means that normally a very exhaustive interview must be undertaken."

The attorney should obtain through simple, direct questions all information available pertaining to the subject matter."

13. "The initial interview is primarily for fact finding information. Most questions are open-ended in an attempt to get the client to tell his own story. Occasionally, I will ask the client several leading questions in order to help him communicate his own response."

Question 15 On the basis of your experience, define or describe how an "expert" attorney would develop a line of questioning while taking a deposition.

1. "I am assuming that this is not a friendly witness so that a statement has not been taken. Additionally, the mechanics of a deposition should be explained to the witness; during the stage of the deposition, the witness should be encouraged to ask for clarification if they don't understand a particular question and to refer to documents if necessary. Use this first stage to establish rapport with the witness and to make a thorough record so that the record reflects that the lawyer is being fair with the witness and not trying to trap the witness. The careful lawyer will prepare an outline prior to the deposition. This outline will cover every single facet of the area of examination to the extent that it is possible, through other statements, depositions and document examination, to develop. By use of the outline, the attorney will know the area that should be developed and this development should be slow and deliberate. It is like 'building blocks' so that you start a particular area of inquiry with basic, simple questions and slowly move into further refinement. Don't rush. Never leave an area of inquiry until the area has either been completely exhausted or, because of strategic reason, you elect to temporarily hold further inquiry or development late in the deposition. It is important to thoroughly exhaust every area of inquiry so that when you leave the deposition, you know that you have extracted all information from this particular witness that is relevant or may be relevant to the case. Questions should be short and to the point; long, extensive sentences are counterproductive. If you want to develop a

particular point -- and it is important to develop it through this particular witness -- by the use of short, pointed questions, get the witness to admit points that cannot be denied and then slowly lead into the point for which you seek an admission. Keep in mind that there is a distinct difference between examining a witness for purposes of 'fact gathering,' and examining a witness whose deposition will be used at trial. If you examine a witness for purposes of perpetuating his testimony, you must examine in the same form that you would examine in trial with a particular eye towards the applicable Civil Rules of Procedure to assure admissibility. On the other hand, if you are examining a witness who you expect to testify at the trial so that you are gathering facts or using the deposition to impeach the witness' testimony, you can do so in a less formal manner but still using the approach as outlined above."

2. "In cross-examining a witness, the expert will start by asking direct, open-ended questions. After the witness has revealed his familiarity with the topic, the expert would then lead the witness through the facts to a result or target fact before moving on. In direct examination, questions will be narrow in scope, and changes of topic obtained by announcing to the witness the area to be covered before starting the questions."
3. "Thorough preparation and knowledge of facts and theory of case. Brief outline of areas to cover and responses desired."
4. "This question is really too broad to answer in detail. However, a good attorney would be very thorough in his preparation and have an outline of all areas to be covered and get as much information in advance as possible. A good attorney would 'control' the witness, i.e. not let the witness give vague or evasive answers."
5. "(1) Background information. (2) Get facts by starting from various angles and going toward some occurrence or issue. (3) Summarizing testimony at various points."

6. "There is no specific way to develop a line of questioning. The examination strategy depends on the person being questioned. The strategy employed should elicit the maximum response from the interviewee."
7. "I like to logically organize my questions and proceed from the broad to the specific. However, I understand the strategic importance of 'skipping around' such that the deponent can be caught off guard at times and give a more sincere answer rather than a rehearsed or fabricated answer."
8. "Don't know. I have never developed a line of questioning for a deposition and have only attended a couple depositions as an observer."
9. "Lines of questions have a particular result in mind and the 'line' would vary with the desired result. Usually a line of questioning will begin with innocuous questions which appear unrelated to the action and will culminate with the ultimate point."
10. "Obviously this varies tremendously with respect to the real goals of a deposition. My special activity in taking so-called 'medical depositions' from potentially hostile witnesses requires certain techniques not ordinarily used."
11. "This depends totally on the type of deposition being taken. An 'expert' witness deposition can be taken several ways."
12. "I am sorry but this question is much too broad for me to answer in view of the fact that one will develop a line of questioning in one particular type of deposition while employing another completely different line of questioning in another type of deposition. For instance, the line of questioning in a medical expert deposition will be substantially different from the deposition taken from a plaintiff in a personal injury case. The key factor that is common to all depositions, though, is that the attorney should prepare an in-depth, comprehensive and

exhaustive outline prior to the taking of any deposition. The outline should contain all of the points which the attorney wishes to establish through the deposition, and the attorney should have a clear and precisely stated objective of the taking of the deposition."

13. "Most depositions are taken on a fact finding endeavor or to narrow down particular facts and issues. The attorney should have established particular target issues in which he should question in great detail. The deposition enables the lawyer to form an impression and to make an appraisal of what that witness is going to say and how he is going to say it in court. In trial, the attorney should always know the answers before he asks a question to a particular witness."

Questionnaire B

As with Questionnaire A, responses from two open-ended questions in Questionnaire B have been chosen. The responses presented here are felt to be representative of those given by the survey population at large.

Question 12 In your opinion, what makes a good
"client examiner?"

1. "Someone who has sufficient interpersonal skills to deal with clients; and who has sufficient knowledge of substantive law to be able to ask the right questions."
2. "Clear understanding of the lawyer's role. Knowledge of the techniques; and, an ability to be somewhat aware of oneself and ones effect on others."
3. "A person who has developed an overall approach to being a lawyer and who applies that approach in interviews. There are no magic or single techniques. An interviewer must be herself and a lawyer and then interview from there."

4. "A person who is skilled in listening, in providing motivation and support for the client, in structuring an interview so that the client feels that everything will get covered, in encouraging the client to actively participate in the resolution of his/her own situation, and a person who respects others and is basically non-judgemental."
5. "One that is able to listen and is capable of creating an atmosphere in which the client will relate problems and facts so that lawyers can properly evaluate to determine if a legal problem exists and then communicate alternatives."
6.
 - A. Good Listener
 - B. Interested in people
 - C. Curiosity
 - D. Concerned with detail
 - E. Open-minded
 - F. Non-judgemental
7. "A person who is well prepared in advance of the interview or examination; a person who listens carefully to what is actually being said rather than hearing what he/she expects to hear; a person who is aware of non-verbal communication and makes use of it during the conversation; a person who communicates clearly both in questioning and answering questions; a person who can control the tenor of the conversation."
8. "One who knows how to listen; how to ask questions, to elicit both broad outline and detail."
9. "Person who is concerned in the feelings, needs and desires of the client (person examined). Needs understanding of techniques which facilitate fact-gathering, an understanding of what motivates human behavior and a desire to help people with their problems."
10. "Puts the client at ease, develops confidence. Makes the client feel part of the process. Responds to the client agenda. Ascertains the facts thoroughly. Is reluctant to draw conclusions without hearing all the facts, the story of the other side, and the applicable law."

11. "Someone who is sensitive to the client as a person, as well as the possessor of a legal program; who has prepared as carefully as feasible for the interview; who has had sufficient thoughtful experience to be secure in the interview context; who has good verbal (non-verbal) skills; who is an effective counselor."
12. "A good listener."
13. "Someone who combines good 'technical' skills at question phrasing and understanding the parts of an interview/examination with sensitivity to the idea that a lawyer needs help from the client and a decent person-to-person manner. As a client examining lawyer, you also need fundamental legal knowledge."

Question 13 In the space provided, please comment on the teaching of client examination as it pertains to your law school.

1. "We have a three course sequence on the skills of interviewing, counseling and negotiation. A great deal of personal attention is devoted to individual critiques and all sessions are videotaped for the student's benefit. Some sessions are simulated, others use real clients who are consumers of the services of our legal clinic."
2. "A session is given in the Trial Practice Course. Also, the Lawyering Process course takes about 1/3 of the time on interviewing and counseling. Legal Aid Clinic -- the students spend significant time interviewing clients under faculty supervision with feedback from the leaders."
3. "We have a number of programs which include some training in interviewing:
 - (1) The client counseling program which is student run focuses on interviewing exclusively.
 - (2) Our trial practice courses deal with this in the trial context.
 - (3) Our clinic teaches interviewing.
 - (4) Lawyering skills course includes interviewing.

All the courses include instructive and real or simulated experience."

4. "Interviewing and Counseling is taught as a three unit course. A psychologist participates in many of the sessions. Classroom sessions involve lectures, demonstrations, videotapes, discussions and simulations. Students are also required to participate in a one hour laboratory session each week. These lab sessions consist of an interview of a client/critiquer by one student and observation and critique by two others. In addition, students tape one interview at the beginning of the semester and another one at the end; students self-critique these interviews in writing and go over them individually with the professor."

5. "Presently an intra-school client counseling competition is held in the Law School each year. The past two years we have had over 50 students each year compete. The judges are asked to critique the performances, as well as, choose between the teams competing. Judges include attorneys, psychologists and other persons with counseling backgrounds.
 In addition to this competition, a Law Office Economics course is required. As part of this course the students are introduced to client interviewing.
 Next fall we intend to begin a Client Counseling Board which will run the competition as well as offer seminars in interviewing, counseling and hopefully negotiations.
 Our school encourages skills training and requires 8 semester hours of Trial and Appellate Advocacy. We are using these competitions and seminars to work with the interpersonal skills. We would require a full course in this area if we had the extra faculty position. Skills courses require more teaching time than do the traditional substantive courses and we are continuing to look at ways to provide these experiences to all of our students and not just a small minority who are able to get in one elective course."

6. "Legal Clinic and Practice Skills are electives, each of which focuses on pre-trial skills, including interviewing, counseling, case planning, fact investigation and formal discovery, and negotiation.
 Trial Advocacy is a required course that focuses on the trial process from voir dire to verdict."

7. "Intentionally (either making participants feel at ease or tense) and chooses the correct atmosphere appropriately."
8. "We use Bellow & Moulton 'The Lawyering Process' to teach I, C, & N. (Consult if you wish to experience our program.) Extensive use of NITA and ABA videotapes."
9. "We are just beginning to systematize and expand our program through: I. My seminar; II. More active participation in the ABA Client Counseling Composition; and III. Faculty discussions."
10. "Our faculty has expressed an endorsement of teaching skills at our law school, including interviewing and counseling. At this point, however, we do not have adequate courses to cover this perceived need adequately."
11. "In the first year, students are required to take Legal Writing and Practice. In this year-long course they are taught interviewing skills and practice on 'Client Instructors.' Who are community people trained to critique the quality of the interview. They also work in other areas of interpersonal skills, including pre-trial conference, preparing witnesses, opening and closing statements, direct and cross examinations.
In the second and third year they are required to participate in the Clinical Program with practicing attorneys required to expose them to a variety of practice skills, including interviewing and counseling. In the 3rd year they are required to take Office Practice, which provides a classroom setting for teaching interviewing, counseling and negotiating."
12. "Client examination is a difficult subject to teach to law students as pure interviewing and counseling skills. It is not 'exciting' as trial examination is. And it requires substantial resources from the teacher who should review student exercises individually. Given this we do a good job with a Pretrial Skills course that includes interviewing, counseling, fact investigation, discovery and negotiation and ties these skills together. As yet we do not have overwhelming student demand for this course, but its time is coming."

13. "I find the questions in this questionnaire very difficult to answer as stated. Let me just explain what role client interviewing and counseling has at Northwestern University as I perceive it. What follows is my own personal opinion and my perception of what is important at Northwestern University. I assume for my answers that the term 'client examination' means interviewing.

Client interviewing/counseling is offered in two ways at Northwestern University. It is provided by working with actual cases for those who take Legal Clinic, and it is offered as a very small component of the Clinic course for second-year students: counseling, negotiation and litigation, given in the first semester of each year by the combined faculty of the Legal Clinic. Clinic courses and/or participation in Clinic activities is an elective; not required for graduation. Approximately 60 second-year students participate in Clinic each year. Insofar as I know there is no other formal training in any aspect of the Law School curriculum which involves client counseling. All Clinic students also have opportunities to participate in various other aspects of practice (depositions, trial preparation and participation, etc.) dependent on the cases on which they work. All clinic students working in teams of 2 or 3, do one mock bench trial and one mock jury trial during the second semester Clinic course: Clinical Trial Advocacy.

It seems to me that the facility to do interviewing effectively and expeditiously is extremely important to all lawyers in that it is the beginning of every case and of every attorney-client relationship. Client interviewing can and should be taught in law school. It is one of the essential elements of practice and any law school that has a clinic which sees real cases should be able to provide some opportunities for interviewing experience. However, interviewing is an art. It needs to be practiced to be mastered and that can take years. Insofar as Northwestern University Law School is concerned, interviewing is a minor component of an otherwise very excellent clinical program, and has absolutely no place in the rest of the Law School curriculum.

CONCLUSIONS FROM OPEN-ENDED QUESTIONS

Questionnaire A

In this first questionnaire, two open-ended questions were analyzed. Thirteen results from the first question about the lawyer's "style" during the initial interview have been chosen because they best represent these answers given from the survey population. The attorneys said that first they try to put the client at ease. By doing this, it was felt that the client would be more likely to give "the entire story," including both positive and negative aspects. This is the correct way to begin the initial interview according to the material presented earlier.

Next, the attorneys generally agreed that at the beginning of the interview the client should be allowed to express himself freely. This included letting the client "ramble" if necessary, although several attorneys also reported trying to "guide him or her to relevant areas." It should be noted here that some of the techniques described in Chapter 2 would be of help to many of the attorneys since very few reported using any specific strategies.

The final common denominator to this question would be that several attorneys noted the importance of "getting all of the facts" in the initial interview. Again, very few attorneys mentioned specific ways to go about doing

this, and it could be concluded again that the techniques described in Chapter 2 would be of considerable use here as well.

Several varied responses were obtained from Question 15. Many even said that asking how an "expert" attorney would develop of line of questioning during a deposition was far too broad of a question. This would help to explain the fact that this question received the fewest responses. Nevertheless, of those who did respond, two common points were usually made.

First attorneys said that it was of the utmost importance to be prepared for the deposition. Since facts taken in a deposition are used to build the case for a client, careful preparation is essential. Several attorneys reported using an outline to make sure that all of the points were covered. They tended to feel very strongly that exhaustive questioning of the person being deposed was paramount to the building of a case for the client. Here again, although not all attorneys behind effective questioning and question structure would be of tremendous help if learned and applied.

Secondly, in order for the deposition to flow in a logical and comprehensible manner, the attorney must retain complete control of this type of interview. Allowing the interviewee to ramble here is dangerous. Most attorneys reported making frequent use of closed questions to allow them to retain control.

The answers to this question were so varied and sparse that any conclusions other than the ones given above would be unsubstantiated. The question was, in fact, far too broad.

Questionnaire B

The first question taken from the law school survey was that the professors felt would make a good client examiner. Overall, most of the points made in Chapter 2 were covered in their responses. However, no single response contained all or even a majority of the techniques accepted as tenants of professional interviewing for lawyers. Nonetheless, four common responses were found.

First, the professors recognized the need for thorough preparation; someone "who has prepared as carefully as is feasible for the interview." This, of course, is the first step to successful interviews in nearly all of the currently available material on the subject.

Next, the professors strongly agreed that a good client examiner is, in fact, very concerned with the client and his/her needs. "Attorneys need sufficient interpersonal skills to be able to deal with clients," one attorney said. Another said that it was important to "be concerned in the feelings, needs, and desires of the clients in order to be a good client examiner." The professors felt that good client examiners need to

feel a sense of identification, at some level, with the client. This is very interesting since few professors reported instruction of client counseling at their schools.

The third most common response obtained from the professors was that a good client examiner would make sure that he puts the client at ease. Although this might be a seemingly insignificant point to make, even the professors realized that the success of the initial interview rests, in large part, on how "at ease" a client feels with his or her attorney. The idea is obviously the more at ease a client feels, the more willing he will be to divulge and communicate all relevant information.

The fourth most common response from the professors to this question was that a good interviewer must first be a good listener. In fact, of those responses where listening skills were included as being important, they were most commonly located at the first of the answer. This would seem to indicate that those who recognize the importance of listening skills also feel that it is more or at least as important as the other aspects. The second question (13) dealt with the way in which client examination is taught at each of the law schools. Since these answers are far too broad to be summarized, a list of answers felt to be representative of the group have been included here. Apart from client examination

being taught as a course of it's own, law schools rely on some combination of:

- 1) The Client Counseling Competition
- 2) Moot court
- 3) trial practice courses
- 4) a legal aid clinic

to teach client counseling skills to students. Due to the variety of responses, no further summary can safely or accurately be made.

CHAPTER 5 CONCLUSIONS

There are numerous individual conclusions which may be drawn on the basis of the results obtained from the research questionnaires. However, four general conclusions stand out as being descriptive of the entire analysis. These conclusions are: 1) there is a lack of consistency among law schools in the instruction of client examination skills and principles, 2) there has been little or no change in the approach to end instruction of legal interviewing in the last twenty years since the Freeman Study, 3) lawyers differ greatly in their views on what types of questions are unethical, and 4) there is a very wide range of attitudes among lawyers concerning the instruction of legal interviewing in law school.

The results obtained from Questionnaire B show that there is no consistency among law schools in their approach to legal interviewing instruction. Only half of the schools responding offer classes in legal interviewing. Of those schools offering classes, the content, coursework required, and credit hours received for the classes goes from extremely light to relatively intense. Schools not offering courses in legal interviewing will sometimes rely on optional outside lectures and seminars to teach these skills. Other schools rely on extra-curricular activities such as the ABA sponsored Client Counseling

Competition and/or Moot Court to give students practical experience in this area. Finally, some schools choose to leave legal interviewing practice and instruction to courses and clinics closely related to this subject such as Trial Advocacy and Legal Aid Clinics. Clearly, we must conclude that instruction of legal interviewing takes on a very wide variety of forms, if it is even taught at all.

The second conclusion is drawn by comparing the results of Harrop Freeman's study in 1964 to the results of the study done in 1984 as part of this thesis. This conclusion is that there has been little or no change in either the attitudes and approaches taken by lawyers or law schools over the last twenty years to the instruction of legal interviewing in U.S. law schools. Both studies show: 1) a definite need for legal interviewing skills, 2) a general lack of instruction consistency in this area, 3) a large percentage of the attorney's time being spent interviewing clients, 4) resistance to Legal Interviewing courses being included in the schools' curriculum, 5) agreement that legal interviewing SHOULD be taught (among both lawyers and law schools) and, 6) that the initial interview is an "essential" and "important" element in the lawyer/client relationship. On the basis of these similarities then, it can be concluded that indeed little or no change has occurred concerning attitudes

and approaches taken to the area of legal interviewing over the past twenty years although the need for change has been clearly identified.

A third conclusion drawn from this survey is that lawyers are pronouncedly divided as to exactly what constitutes ethical questions and professional objectivity. Although the results from Questionnaire A (question numbers eight through twelve) were not analyzed in depth in Chapter 4, the results do show that the attorneys are divided quite evenly as to which types of questions are to be considered unethical in either the initial interviews or in the taking of a deposition. Further, the lawyers were of equally divided opinions as to at what point emotional objectivity is lost due to "personal involvement, for whatever reasons, with a client."

The fourth and final conclusion to be drawn concerns lawyers' attitudes towards the interviewing skills. The lawyers responding to Questionnaire A responded almost unanimously that proficiency in legal interviewing is both "important and essential to the practicing attorney." The lawyers also reported feeling equally "unprepared" after graduation from law schools to deal with the extensive client examination required of them. This conclusion goes right to the point of this thesis. There is, in fact, a definite and quantifiable gap in the legal education process between the interviewing skills and techniques required of them as practicing attorneys.

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TABLE 1

Question 7

How important are client examination skills in each of the following scenarios? *

	Not Important		- Very Important		
	1	2	7	26	70
Initial Interview	<u>1</u>	<u>2</u>	<u>7</u>	<u>26</u>	<u>70</u>
Deposition Taking	<u>1</u>	<u>1</u>	<u>8</u>	<u>24</u>	<u>72</u>
Cross Examination	<u>1</u>	<u>2</u>	<u>8</u>	<u>16</u>	<u>79</u>
Trial Proceedings	<u>1</u>	<u>1</u>	<u>5</u>	<u>16</u>	<u>83</u>

* Given by frequency of responses. Total = 106

TABLE 2

Question 12

Please place a check mark in any column which contains a question type that could possibly be construed as being even slightly unethical during the initial interview and deposition taking. **

	<u>Initial Interview</u>	<u>Deposition Taking</u>
Closed Questions	<u>5</u>	<u>1</u>
Leading Questions	<u>17</u>	<u>5</u>
Bipolar Questions	<u>16</u>	<u>9</u>
Emotionally Loaded Questions	<u>12</u>	<u>10</u>
Hypothetical Questions	<u>5</u>	<u>3</u>
Asking Several Questions at Once	<u>8</u>	<u>13</u>
Threatening Questions	<u>71</u>	<u>40</u>
Missed Questions	<u>66</u>	<u>11</u>

** Given by frequency of responses. Total = 106

TABLE 3

List of Questionnaire A Undergraduate Majors. Given by frequency. Total = 106.

Business	23
Political Science	18
Economics	10
History	8
English	6
Accounting	6
Journalism	5
Engineering	3
Other	<u>27</u>
Total	106

TABLE 4

List of Legal Specialities from Questionnaire A. Given by frequency. Total = 106.

Litigation	46
Corporate	17
Estate Planning	9
Tax	9
General	9
Labor Law	5
Real Estate	5
Malpractice	3
Product Liability	1
Other	<u>2</u>
Total	106

Sizes of law schools surveyed in Questionnaire B. By frequency.

<u>School Size</u>	<u>Number Per Division</u>
000 - 333	8
334 - 666	29
667 - 999	17



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DEPARTMENT OF COMMUNICATION STUDIES

3090 Wescoe Hall
(913) 864-3633

February 23, 1984

Dear Member of the Bar:

I am a pre-law student at the University of Kansas writing an undergraduate honors thesis on a) the way in which lawyers communicate with their clients and b) the kind of communication training lawyers receive in law school. Your name has been chosen at random through the Martindale-Hubbell directory to participate in this survey.

As there is no other way to get this information, your help can be very valuable to me. The enclosed questionnaire should take no longer than five minutes to fill out. If you are interested, I will be happy to send you a copy of the results.

Sincerely yours,

Steven K. Russell

Steven K. Russell

Cal W. Downs

Cal W. Downs
Professor
Thesis Director

Laurence Rose

Laurence Rose
Professor of Law

YOUR CITY _____ NUMBER OF YEARS IN PRACTICE _____

YOUR LAW SCHOOL _____ UNDERGRADUATE DEGREE _____

LEGAL SPECIALIZATION _____

1. What weaknesses do you most often see in the way lawyers examine their clients/witnesses?

2. What percentage of your time do you spend examining clients/witnesses?

_____ 0-20% _____ 21-40% _____ 41-60% _____ 61-80% _____ 81-100%

3. What is the average amount of time you spend with a client during the initial interview?

4. Do you have any special training in client examination? _____ YES _____ NO

If yes, was your training in the form of:

_____ A course in law school

_____ Part of a course

_____ A special seminar

_____ On the job experience

_____ Moot court

_____ Other (please specify) _____

5. Lawyers SHOULD have special training in client examination.

AGREE _____ DISAGREE _____

If not, why not?

If so, why?

6. Most lawyers CAN be trained to improve client examination skills.

AGREE _____ DISAGREE _____

7. How essential are client examination skills in each of the following scenarios?

	NOT IMPORTANT			VERY IMPORTANT
Initial interview	_____	_____	_____	_____
Deposition taking	_____	_____	_____	_____
Trial proceedings	_____	_____	_____	_____
Cross examination	_____	_____	_____	_____

8. To what extent do most lawyers become emotionally involved, for whatever reason, in their clients' cases?
Very Often _____ Never
9. To what extent does emotional involvement in a case destroy the objectivity in a legal interview?
No Effect On _____ Completely Destroys
Objectivity _____ Objectivity
10. In what ways might a lawyer become emotionally involved in their clients cases?
_____ Ego
_____ Desire to help client
_____ Social relationship with the client
_____ Other (please specify) _____
11. Please check the types of questions which you might use either in the process of taking depositions or during the initial interview.

	DEPOSITION		INITIAL INTERVIEW	
	Frequently	Occasionally	Frequently	Occasionally
Closed Questions. Requires a specific response, such as a yes or no.	_____	_____	_____	_____
Leading Questions. The person asking "leads" the person answering to a specific response.	_____	_____	_____	_____
Funnel Questions. Begins with a vague question and ends by forcing a particular answer from a client based upon his earlier answers.	_____	_____	_____	_____
Bipolar Questions. Leaves the client only one of two choices, when there is in face a third possible choice. For example: "Is this wise or unwise?"	_____	_____	_____	_____
Emotionally Loaded Questions.	_____	_____	_____	_____
Hypothetical Questions.	_____	_____	_____	_____
Asking several questions at once.	_____	_____	_____	_____
Threatening Questions, such as "Mrs. Jones, are you fully aware of the severe penalties for perjury?"	_____	_____	_____	_____
Missed Questions. The intentional failure to ask further questions concerning relevant but possibly damaging information.	_____	_____	_____	_____

12. Please place a check mark in any column which contains a question type that could possibly be construed as being even slightly unethical during the initial interview and/or deposition taking.

	INITIAL INTERVIEW	DEPOSITION
Closed Questions	_____	_____
Leading Questions	_____	_____
Bipolar Questions	_____	_____
Emotionally Loaded Questions	_____	_____
Hypothetical Questions	_____	_____
Asking several questions at once	_____	_____
Threatening Questions	_____	_____
Missed Questions	_____	_____

13. To what extent do law schools need to improve the training of lawyers in the area of client examination?

Very Much _____ Not At All

14. Please describe your "style" of questioning during the initial interview.

15. On the basis of your experience, define or describe how an "expert" attorney would develop a line of questioning while taking a deposition.

16. Would you be willing to participate in a personal interview concerning this survey at a later date?

____ YES ____ NO

If so, please print your name, address, and business phone number below.



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THE UNIVERSITY OF KANSAS • LAWRENCE, KANSAS • 66045-2175

DEPARTMENT OF COMMUNICATION STUDIES

Dear Professor:

I am a pre-law senior at the University of Kansas writing an honors thesis on a) the way in which lawyers communicate with their clients and b) the kind of communication training lawyers receive in law school. The director of the Client Counseling Competition at the ABA recommended you to me as the most qualified person at your particular law school to fill out this questionnaire.

Your help can be very valuable to me. It should take only five minutes to fill out, and there is no other way of getting this information. If you are interested, I will be happy to send you a copy of the results.

Sincerely yours,

Steven K. Russell

Steven K. Russell

Professor Cal W. Downs

Faculty Advisor

_____ I would like to have a copy of the results sent to me.

NAME OF LAW SCHOOL _____

ADDRESS _____

NUMBER OF STUDENTS ENROLLED _____

CURRENT TUITION PER SEMESTER _____

1. Please list, in order of importance, the factors considered in the screening of perspective law students.

1. _____

2. _____

3. _____

4. _____

2. Does your law school offer any classes dealing exclusively with client examination? ____ YES ____ NO

Is this course required for graduation? ____ YES ____ NO

Please name this course(s). _____

3. How often does your school make use of outside lectures, seminars, etc., to teach client examination?

Frequently _____ Never

4. What percent of the student body participates in the lectures, seminars, etc., described in Question 3?

____ 0-20% ____ 21-40% ____ 41-60% ____ 61-80% ____ 81-100%

5. What percentage of your students receive formal classroom training in client examination prior to graduation?

____ 0-25% ____ 26-50% ____ 51-75% ____ 76-100%

6. What percentage of your students are given practical instruction regarding client examination?

____ Initial Interview

____ Deposition Taking

____ The Trial Examination

____ Cross Examination

7. How important is client examination (legal interviewing) to the practicing attorney?

Very Important _____ Not Important

8. What topics or areas should be taught concerning client examination?

a)

b)

c)

9. Is consideration ever given to the applicant's interest or ability in the area of client examination (legal interviewing) during the process of screening perspective law students?

Sometimes _____ Never

10. Client examination skills are something that CAN be taught in law school.

Agree _____ Disagree

11. Client examination skills are something that SHOULD be taught in law school.

Agree _____ Disagree

In your opinion, what makes a good "client examiner?"

In the space provided, please comment on the teaching of client examination as it pertains to *Your* law school.

YOUR CITY _____ NUMBER OF YEARS IN PRACTICE _____

YOUR LAW SCHOOL _____ UNDERGRADUATE DEGREE _____

LEGAL SPECIALIZATION _____

1. What weaknesses do you most often see in the way lawyers examine their clients/witnesses?

2. What percentage of your time do you spend examining clients/witnesses?

<u>50%</u> 0-20%	<u>36%</u> 21-40%	<u>8%</u> 41-60%	<u>5%</u> 61-80%	<u>1%</u> 81-100%
53	39	8	5	1

3. What is the average amount of time you spend with a client during the initial interview?

60-75 minutes

4. Do you have any special training in client examination? 40% YES 60% NO

42 64

If yes, was your training in the form of:

11% A course in law school

10% Part of a course

13% A special seminar

40% On the job experience

8% Moot court

____ Other (please specify) _____

5. Lawyers SHOULD have special training in client examination.

AGREE	<u>53%</u>	<u>26%</u>	<u>10%</u>	<u>4%</u>	<u>7%</u>	DISAGREE
	56	28	9	5	8	

If not, why not?

If so, why?

6. Most lawyers CAN be trained to improve client examination skills.

AGREE	<u>62%</u>	<u>28%</u>	<u>5%</u>	<u>5%</u>	<u>5%</u>	DISAGREE
	65	29	4	4	4	

7. How essential are client examination skills in each of the following scenarios?

	NOT IMPORTANT				VERY IMPORTANT
Initial interview	<u>1%</u>	<u>2%</u>	<u>6%</u>	<u>25%</u>	<u>66%</u>
Deposition taking	<u>1%</u>	<u>1%</u>	<u>7%</u>	<u>23%</u>	<u>68%</u>
Trial proceedings	<u>1%</u>	<u>1%</u>	<u>4%</u>	<u>15%</u>	<u>79%</u>
Cross examination	<u>1%</u>	<u>2%</u>	<u>7%</u>	<u>15%</u>	<u>75%</u>

8. To what extent do most lawyers become emotionally involved, for whatever reason, in their clients' cases?
- | | | | | | | |
|------------|-----------|------------|------------|------------|-----------|-------|
| Very Often | <u>8%</u> | <u>30%</u> | <u>36%</u> | <u>25%</u> | <u>1%</u> | Never |
| | 9 | 31 | 38 | 27 | 1 | |
9. To what extent does emotional involvement in a case destroy the objectivity in a legal interview?
- | | | | | | | |
|--------------------------|-----------|------------|------------|------------|-----------|---------------------------------|
| No Effect On Objectivity | <u>6%</u> | <u>17%</u> | <u>38%</u> | <u>33%</u> | <u>6%</u> | Completely Destroys Objectivity |
| | 7 | 18 | 39 | 35 | 7 | |
10. In what ways might a lawyer become emotionally involved in their clients cases?
- 65% Ego
- 83% Desire to help client
- 53% Social relationship with the client
- 26% Other (please specify) _____
11. Please check the types of questions which you might use either in the process of taking depositions or during the initial interview.

	DEPOSITION		INITIAL INTERVIEW	
	Frequently	Occasionally	Frequently	Occasionally
Closed Questions. Requires a specific response, such as a yes or no.	<u>56%</u>	<u>44%</u>	<u>23%</u>	<u>77%</u>
Leading Questions. The person asking "leads" the person answering to a specific response.	<u>60%</u>	<u>40%</u>	<u>17%</u>	<u>83%</u>
Funnel Questions. Begins with a vague question and ends by forcing a particular answer from a client based upon his earlier answers.	<u>62%</u>	<u>38%</u>	<u>25%</u>	<u>75%</u>
Bipolar Questions. Leaves the client only one of two choices, when there is in face a third possible choice. For example: "Is this wise or unwise?"	<u>36%</u>	<u>64%</u>	<u>10%</u>	<u>90%</u>
Emotionally Loaded Questions.	<u>18%</u>	<u>82%</u>	<u>13%</u>	<u>87%</u>
Hypothetical Questions.	<u>32%</u>	<u>68%</u>	<u>27%</u>	<u>73%</u>
Asking several questions at once.	<u>10%</u>	<u>90%</u>	<u>8%</u>	<u>92%</u>
Threatening Questions, such as "Mrs. Jones, are you fully aware of the severe penalties for perjury?"	<u>9%</u>	<u>91%</u>	<u>0%</u>	<u>100%</u>
Missed Questions. The intentional failure to ask further questions concerning relevant but possibly damaging information.	<u>17%</u>	<u>83%</u>	<u>1%</u>	<u>99%</u>

12. Please place a check mark in any column which contains a question type that could possibly be construed as being even slightly unethical during the initial interview and/or deposition taking.

	INITIAL INTERVIEW	DEPOSITION
Closed Questions	<u>5%</u>	<u>1%</u>
Leading Questions	<u>17%</u>	<u>5%</u>
Bipolar Questions	<u>16%</u>	<u>8%</u>
Emotionally Loaded Questions	<u>12%</u>	<u>9%</u>
Hypothetical Questions	<u>5%</u>	<u>3%</u>
Asking several questions at once	<u>7%</u>	<u>12%</u>
Threatening Questions	<u>70%</u>	<u>40%</u>
Missed Questions	<u>66%</u>	<u>11%</u>

13. To what extent do law schools need to improve the training of lawyers in the area of client examination?

Very Much	<u>21%</u>	<u>33%</u>	<u>35%</u>	<u>6%</u>	<u>5%</u>	Not At All
	22	35	37	7	5	

14. Please describe your "style" of questioning during the initial interview.

See chapter 4

15. On the basis of your experience, define or describe how an "expert" attorney would develop a line of questioning while taking a deposition.

See chapter 4

16. Would you be willing to participate in a personal interview concerning this survey at a later date?

☐ YES ☐ NO

If so, please print your name, address, and business phone number below.

NAME OF LAW SCHOOL _____

ADDRESS _____

NUMBER OF STUDENTS ENROLLED _____

CURRENT TUITION PER SEMESTER _____

1. Please list, in order of importance, the factors considered in the screening of perspective law students.

1. _____

2. _____

3. _____

4. _____

2. Does your law school offer any classes dealing exclusively with client examination? 50% YES 50% NO

Is this course required for graduation? 9% YES 91% NO

Please name this course(s). _____

3. How often does your school make use of outside lectures, seminars, etc., to teach client examination?

Frequently	<u>6%</u>	<u>6%</u>	<u>20%</u>	<u>42%</u>	<u>26%</u>	Never
	3	3	11	23	14	

4. What percent of the student body participates in the lectures, seminars, etc., described in Question 3?

<u>70%</u> 0-20%	<u>18%</u> 21-40%	<u>6%</u> 41-60%	<u>2%</u> 61-80%	<u>4%</u> 81-100%
38	10	3	1	2

5. What percentage of your students receive formal classroom training in client examination prior to graduation?

<u>54%</u> 0-25%	<u>17%</u> 26-50%	<u>17%</u> 51-75%	<u>12%</u> 76-100%
29	9	9	7

6. What percentage of your students are given practical instruction regarding client examination?

40% Initial Interview

21% Deposition Taking

49% The Trial Examination

42% Cross Examination

7. How important is client examination (legal interviewing) to the practicing attorney?

Very Important	<u>78%</u>	<u>15%</u>	<u>6%</u>	<u>0%</u>	<u>2%</u>	Not Important
	42	8	3	0	1	

8. What topics or areas should be taught concerning client examination?

a) _____

b) _____

c) _____

9. Is consideration ever given to the applicant's interest or ability in the area of client examination (legal interviewing) during the process of screening perspective law students?

Sometimes 6% 2% 4% 31% 57% Never

10. Client examination skills are something that CAN be taught in law school.

Agree	<u>82%</u>	<u>13%</u>	<u>2%</u>	<u>3%</u>	<u>0%</u>	Disagree
	44	7	1	2	0	

11. Client examination skills are something that SHOULD be taught in law school.

Agree	<u>70%</u>	<u>20%</u>	<u>4%</u>	<u>4%</u>	<u>2%</u>	Disagree
	38	11	2	2	1	

In your opinion, what makes a good "client examiner?"

See chapter 4.

In the space provided, please comment on the teaching of client examination as it pertains to *Your* law school.

See chapter 4.